Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition for Rulemaking and Declaratory Ruling	)	CG Docket No. 05-338
of Craig Moskowitz and Craig Cunningham	)	

COMMENTS OF THE INTERNET ASSOCIATION

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The Internet Association hereby submits these comments in opposition to Craig Moskowitz's and Craig Cunningham's ("Petitioners") Petition for Rulemaking and Declaratory Ruling ("the Petition").[1]

INTRODUCTION AND SUMMARY

The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies and their global community of users.[2] The Internet economy has a substantial economic impact. As of 2012, nearly 3 million workers were employed directly by the Internet sector in the United States, and in 2014 the Internet sector was responsible

[1] Petition of Craig Moskowitz and Craig Cunningham for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (FCC Jan. 22, 2017) ("Petition").

[2] The Internet Association represents the world's leading Internet companies, including: Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snapchat, Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga.

for 6% ($966.2 billion) of the United States' real GDP.[3] The Internet Association is dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.

The Internet Association's members have been pioneers in establishing new and innovative methods for people and businesses to engage in commerce and to distribute messages to users and consumers alike. Many of these innovative business models involve the frequent use of cellular calling and, in particular, text-message-based communications between businesses and their consumers.

The Telephone Consumer Protection Act ("TCPA") prohibits a person from making a call using an automatic telephone dialing system to a cellular phone number, or using an artificial or prerecorded voice to a residential or cellular phone number, without the "express consent of the called party."[4] The Association's members' relationships with their consumers rely on the consent that is evidenced when a telephone number is provided to a dialing party with no instructions to the contrary. The Commission has long recognized that this constitutes "express consent" within the meaning of the TCPA. This is particularly true where a consumer provides a dialing party with his or her telephone number in the context of a transaction or in order to institute a commercial relationship. Take, for example, a ridesharing application, or a travel booking website. In both instances, a consumer *expects* to receive additional informational communications from the company, irrespective of the method by which those communications are distributed.

Accepting the proposal set forth in the Petition would eliminate this vital, and commonsense, indicia of consent. It would create potential liability where dialing parties

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[3] *See New Report Calculates the Size of the Internet Economy*, Internet Association (Dec. 10, 2015), https://internetassociation.org/121015econreport/.

[4] 47 U.S.C. § 227(b)(1)(A)(iii), (b)(1)(B).

communicate welcomed, time-sensitive, and even critical information regarding data security and fraud to consumers. And it would exacerbate the pressing concerns already posed by other features of the Commission's most recent declaratory ruling and order. Accordingly, the Commission should deny the Petition.

I. The FCC's Current Approach to Express Consent Accounts for the Reality of Commerce and Communication in the Internet Age.

Among other things, the TCPA requires dialing parties to obtain the "express consent of the called party" before using an automatic telephone dialing system or artificial or prerecorded voice to make a call to a cellular phone number, or before using an artificial or prerecorded voice to make a call to a residential phone number.[5] The Commission has properly interpreted this language to recognize that communications between parties in a commercial relationship are expected. When dialing parties act in good faith—and confine their communications to the anticipated scope of these relationships—the harm the TCPA is intended to prevent is not present.

Specifically, the Commission has long, and correctly, concluded that the provision of a telephone number, itself, evidences express consent to be contacted by the party to whom that number is given. In its 1992 Order, the Commission responded to commenters that expressed "the view that any telephone subscriber that provides his or her telephone number to a business does so with the expectation that the party to whom the number was given will return the call."[6] Agreeing with those commenters, the Commission recognized that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which

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[5] *Id.*

[6] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8769 ¶ 30 (1992) ("1992 Order").

they have given, absent instructions to the contrary."[7] In 2008, the Commission explained that this type of consent—namely, a party's expectation that, having provided his or her number, he or she will expect to be contacted—applies equally to calls made by a creditor in connection with a debt. The Commission concluded that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."[8] Most recently, in 2015, the Commission again emphasized that "[f]or non-telemarketing and non-advertising calls, express consent can be demonstrated by the called party giving prior express oral or written consent or, in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call."[9] The Commission's declaratory orders therefore recognize that, where a subscriber or consumer provides his or her telephone number to a business or entity, the mere provision of that number evidences an expectation of—and consent to receiving—informational calls regarding that transaction or commercial relationship. Additional communications are anticipated and desired—and when those communications are made in good faith, the dialer should not be penalized.

The Internet—and the multitude of opportunities for both social and commercial communication that medium has fostered—exemplifies this kind of relationship. And the Internet Association's members, in particular, have been pioneers in establishing new and innovative ways for people and businesses to engage in commerce and distribute the sorts of computerized, tailored,

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[7] *Id.* at 8769 ¶ 31.

[8] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559, 564 ¶ 9 (2008) ("2008 Order").

[9] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7991-92 ¶ 52 (2015) ("2015 Order") (footnotes omitted).

and targeted messages that users and consumers desire. The Internet Association's members have no interest in distributing randomized or "sequential" messages; nor do they have any reason to do so.

Consider a ride-sharing application like Lyft or Uber, which is tied directly to a user's cellular telephone. A user provides his or her telephone number when signing up for the application. When ordering a ridesharing vehicle, the user may receive a text message alerting him or her to the estimated arrival time of the vehicle. The same is true for many food delivery applications, which provide timely notifications as a customer's order is received, prepared, and en route for delivery. Hotel, flight, and other travel booking websites or services offer similar examples; often consumers will sign up for an alert tracking the fluctuations in a particular route's cost, or will receive notifications informing them of a change in a previously booked itinerary.

As these examples demonstrate, businesses—and particularly Internet-based businesses—have enabled rapid communications that provide a host of news, information, and entertainment to consumers. In each of these scenarios, there is an initial transaction among the parties, during which a telephone number is provided to the dialing party and a commercial relationship is created. The dialing party should not be penalized for then contacting the phone number it has been provided, particularly when calling in good faith. Indeed, the Commission has recognized that allowing these types of communications is a public good. In its 2012 Order, the Commission stated: "[W]e . . . acknowledge that wireless services offer access to information that consumers find highly desirable and thus do not want to discourage purely informational messages."[10] In the

[10] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1841 ¶ 29 (2012) ("2012 Order").

context of such a transaction, it is foreseeable to consumers that they will receive future informational communications.

The subsequent communications are not only "desirable," but the manner by which they are sent is immaterial to the consumer. The consumer seeks the information conveyed by the communication, irrespective of *how* the call or text message is initiated. Some members of Congress made a similar point when enacting the TCPA. In its Committee Report, the House Energy and Commerce Committee explained that:

> The restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers. For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer [or] recorded message player to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid.[11]

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[11] H.R. Rep. No. 102-317, at 17 (1991). Petitioners contend that the FCC cannot properly rely on this legislative history, claiming that the House Committee Report purportedly conflicts with an earlier Senate Committee Report. *See* Petition at 27-28. The Senate Commerce, Science, and Transportation Committee declined to amend the version of the TCPA then under consideration to outright exempt "automated calls made by companies to tell people who have ordered products that the item is ready for pickup; automated calls made for debt collection purposes; and automated calls that ask a customer to 'Please hold. An operator will be with you shortly.'" S. Rep. No. 102-178, at 3-4 (1991). Although declining to add an explicit exemption, the Senate Committee reiterated that such calls *are* permissible under the TCPA if "the called party gives his or her consent to the use of the machines." *Id.* at 4.

No one contests that a dialing party must obtain express consent in some form. But the Senate Report sheds no light on the *form* that consent should take, and thus is not inconsistent with the House Report's conclusion that the TCPA's restrictions "do[] not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications." H.R. Rep. No. 102-317, at 17. Moreover, Petitioners neglect to note that the Senate Committee, "[i]n response to these concerns," expressly rejected the written consent requirement that Petitioners seek here. S. Rep. No. 102-178, at 4. And, ultimately, to the extent there remains some discord between the House and Senate Committee reports, the discrepancy merely confirms that the Commission's reasonable interpretation of the ambiguous term "express consent" is entitled to deference. *See Rust v. Sullivan*, 500 U.S. 173, 185-87 (1991) (after finding ambiguity, declining to rely on "highly generalized, conflicting statements in the legislative history," and instead deferring to agency's interpretation of the statute); *cf. Milner v. Dep't of*

These types of calls or communications, initiated by the party to whom the phone number was provided, and which relate to that initial transaction, are distinct from the situations the TCPA is intended to prevent: nuisance calls from telemarketers or other actors who dial numbers generated randomly, or dial from a database of stored telephone numbers obtained from a third party.[12] So long as the dialing party acts in good faith and the communications remain within the scope of the parties' relationship (and, accordingly, within the scope of the consent that was provided), the TCPA's express consent requirement is satisfied.[13]

Moreover, the Commission currently permits dialing parties to rely on this conception of express consent only when making *informational* calls, and several safeguards exist to prevent the potential abuse of that consent. The telephone number must be provided knowingly.[14] The number must be provided directly to the party that does the dialing, although an agent may, on

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Navy, 562 U.S. 562, 574 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it."); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950) (refusing to refer to legislative history that "is more conflicting than the text is ambiguous"), *superseded by statute as stated in Ardestani v. INS*, 502 U.S. 129 (1991).

[12] *See, e.g.*, Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394 (finding that "[t]he use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques," and that "[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers").

[13] *Cf. In re GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 29 FCC Rcd 3442, 3446 ¶ 11 (2014) (citing the 2008 Order and concluding that, "[u]nder the facts presented by GroupMe, text messages from GroupMe to consumers associated with the specific group the consumer agreed to join fall within the scope of the permission that the consumer granted").

[14] *See, e.g.*, 1992 Order, 7 FCC Rcd at 8769 ¶ 31 ("[I]f a caller's number is 'captured' by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.").

occasion, place a call on the dialing party's behalf.[15] And regardless of who does the dialing, the communication must also be made in connection with and within the scope of that original transaction.[16]

II. Petitioners' Proposal is Impractical and Would Dramatically Increase the Burden on Regulated Parties, Particularly the Internet Association's Members.

Petitioners' proposal to require written, and minutely specific consent for nearly all calls subject to the TCPA regardless of the context or other indicia of consent[17] is inimical to the very types of relationships that consumers, users of social media, and those that transact business on the Internet have come to expect. As the Commission has observed, requiring "prior express *written* consent for all robocalls to wireless numbers would serve as a disincentive to the provision of services on which consumers have come to rely."[18] The same concern is true today—and applies equally to any effort to require additional oral or written consent beyond that evidenced by a consumer's provision of a telephone number.

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[15] *See, e.g.*, 2015 Order, 30 FCC Rcd at 7992 ¶ 52 ("By itself, the fact that a phone number is in a contact list fails to provide any evidence that the subscriber to that number even gave the number *to the owner of the contact list*." (emphasis added)); *see also* 2008 Order, 23 FCC Rcd at 565 ¶ 10 & n.38 (concluding that "[c]alls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call," but cautioning that "prior express consent provided to a particular creditor will not entitle that creditor (or third party collector) to call a consumer's wireless number on behalf of other creditors, including on behalf of affiliated entities").

[16] *See* 2008 Order, 23 FCC Rcd at 564 ¶ 9 (determining that the provision of a telephone number to a creditor expresses consent "to be contacted at that number *regarding the debt*" (emphasis added)); *id.* at 564-65 ¶ 10 ("We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided *during the transaction that resulted in the debt owed*." (emphasis added)).

[17] *See* Petition at 2. Petitioners would retain the exception for calls made by tax-exempt nonprofit organizations and certain health care messages, for which the Commission currently permits non-written consent. *See id.* at 37.

[18] 2012 Order, 27 FCC Rcd at 1841 ¶ 29 (emphasis added).

As the Internet Association has previously pointed out to the Commission, plaintiffs have used the TCPA to target particularly beneficial communications that are sent to consumers, including notifications of potential identity theft or fraud, and notices regarding potential data breaches disclosing consumers' personal information.[19] These communications are vital to consumers. Almost all states mandate that organizations disclose data breaches to affected individuals,[20] and many require that notice be provided in "the most expedient time possible and without unreasonable delay."[21] In addition, text messages have proven to be a particularly effective method of reaching consumers, and are opened at over four times the rate of email messages.[22]

Useful and purely informational communications like these are not confined to the Internet, either. Schools, utility companies, health care providers, and many other entities often provide them. The content of these notifications may range from alerts and communications from a child's school regarding safety information, or from product manufacturers or retailers regarding a recall, to announcements regarding airline delays or utility service outages.[23] But, "given the current uncertain state of the law, companies are reluctant to rely on communications to mobile phones even for critical information such as fraud alerts and data breach and remediation notifications."[24]

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[19] *See* Comments of the Internet Association, CG Docket No. 02-278 (FCC Dec. 8, 2014) ("Internet Association Comments").

[20] *See, e.g.*, Cal. Civ. Code § 1798.82; N.Y. Gen. Bus. Law § 899-aa; 815 Ill. Comp. Stat. 530/10.

[21] Cal. Civ. Code § 1798.82(a); *accord* N.Y. Gen. Bus. Law § 899-aa(2); 815 Ill. Comp. Stat. 530/10(a).

[22] Internet Association Comments at 4; *see* Aine Doherty, *SMS Versus Email Marketing*, Business 2 Community (July 28, 2014), http://www.business2community.com/digital-marketing/sms-versus-email-marketing-0957139#!bth7SG.

[23] *See, e.g.*, 2015 Order, 30 FCC Rcd at 8084-85 (dissenting statement of Commissioner O'Rielly).

[24] Internet Association Comments at 4.

As a result, creating an additional hurdle to the dissemination of these types of communications is unwise and unwarranted, and exceeds the scope of the problem that Congress intended to combat when it enacted the TCPA. Particularly in light of the nebulous interpretation the Commission has given to the term "automatic telephone dialing system,"[25] dialing parties might be required to seek renewed consent—under Petitioners' proposed rule, in writing—whenever they alter their existing notification systems. Or, an entity that does not typically make use of automatic telephone dialing systems or prerecorded devices would be required to seek consent from each of its customers before doing so—delaying the very information that those mechanisms are attempting to deliver in a timely manner.

Ultimately, when, "in the absence of instructions to the contrary," the person initiating the autodialed or prerecorded call has been provided a wireless number to call,[26] future informational communications are anticipated. If the dialing party acts in good faith—and within the scope of the relationship established when the number was provided—the TCPA should not subject the dialing party to liability when it merely communicates in a way that would be normal and expected.

III. To Accept Petitioners' Proposal Would Exacerbate the Already Pressing Problems That Other Aspects of the Commission's Recent Declaratory Ruling and Order Pose.

To accept Petitioners' proposal would be all the more problematic because the consent evidenced by a consumer's provision of a telephone number is one of the Internet Association's members' few remaining bulwarks against ever-expanding TCPA liability. For example, while

[25] The Commission has rejected a narrow interpretation of "automatic telephone dialing systems" that would focus on equipment's present abilities, but has only vaguely defined the outer boundaries of the term, stating that to fall within the TCPA "there must be more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition." 2015 Order, 30 FCC Rcd at 7974-75 ¶¶ 16, 18.

[26] *Id.* at 7991-92 ¶ 52.

acknowledging that "callers lack guaranteed methods to discover all reassignments [of phone numbers] immediately after they occur,"[27] the Commission has interpreted the TCPA to require the consent of the *current* subscriber or customary user of a phone number—rather than the intended recipient of a call.[28] Over 37 million telephone numbers are reassigned annually. Thus, "even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned to new person," because "consumers don't preemptively contact every business to which they have given their number to inform them of the change."[29] And although the Commission stated that allowing dialing parties one liability-free call following a reassignment will provide actual or constructive notice to a caller that a number has been reassigned,[30] that assumption is particularly problematic for text-based communications, "such as reminders, where no response is expected or routinely provided."[31] Thus, if companies are forced to guess about the continuing validity of a party's consent, they might "discontinue texts" altogether, "angering consumers that had specifically requested texts, for example, to remind them to pay a monthly bill, but then miss a payment because they didn't get a reminder."[32]

Similar problems are true of the Commission's treatment of revocation of consent. In its 2015 Order, the Commission clarified that "a called party may revoke consent at any time and through any reasonable means," and that a caller "may not limit the manner in which revocation

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[27] *Id.* at 8006 ¶ 85.

[28] *Id.* at 7999-8000 ¶ 72.

[29] *Id.* at 8077 (dissenting statement of then-Commissioner Pai).

[30] *See, e.g.*, *id.* at 7999-8000 ¶ 72.

[31] *Id.* at 8091 (dissenting statement of Commissioner O'Rielly).

[32] *Id.*

may occur" or require a standardized, exclusive method by which a party must revoke consent.[33] But if dialing parties have no reliable, predictable means to ensure the continuance of the consent on which the Commission has said they may rely, dialing parties might be compelled to forgo those very communications that the Commission has rightly concluded should be fostered.

These rulings are themselves inconsistent with the original intent of the TCPA and are already "forc[ing] companies acting in good faith to discontinue valuable services altogether."[34] The Internet Association hopes the Commission will revisit these rulings in the near term. In the meantime, however, the Commission should reiterate that a dialing party who acts in good faith when contacting a phone number that was provided knowingly does not contravene the TCPA's prior express consent requirement—as that will prevent the further exacerbation of these problems. To do otherwise would inhibit "access to information that consumers find highly desirable" and "discourage purely informational messages" that the TCPA was never intended to deter.[35]

[33] *Id.* at 7989-90 ¶ 47; *see also id.* at 7996 ¶¶ 63-64.

[34] *Id.* at 8087 (dissenting statement of Commissioner O'Rielly).

[35] 2012 Order, 27 FCC Rcd at 1841 ¶ 29.

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition for Rulemaking and Declaratory Ruling.

Respectfully submitted,

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